

IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No.96 of 2020

Pramila Das

.....

Appellant

Mr. P.K. Nayak, Adv.

-Versus-

Gourahari Das

.....

Respondent

Mr. R.C. Behera, Adv.

CORAM:

JUSTICE S. TALAPATRA

JUSTICE M.S. SAHOO

ORDER

01.08.2022

Order No.

10.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).
2. Heard Mr. P.K. Nayak, learned counsel appearing for the appellant as well as Mr. R.C. Behera, learned counsel appearing for the respondent.
3. This is an appeal under Section 19 (1) of the Family Courts Act, 1985 against the ex parte Judgment and decree respectively dated 26.08.2019 and 05.09.2019 delivered in Civil Proceeding No.148 of 2018 by the Judge Family Court, Kendrapara.
4. The Respondent filed the matrimonial suit for dissolution of marriage by way of decree of divorce on the ground of cruelty. In pursuance to the said Judgment, the decree of divorce has been issued ex parte.
5. Mr. R.C. Behera, learned counsel has referred the order dated 22.12.2018 wherein the Process Server's report has been paraphrased.

According to the Process Server, when the appellant was approached to receive and acknowledge the receipt of summon from the Court, she refused to acknowledge it and thereafter the Process Server pasted a copy of the notice along with the petition in a conspicuous place.

6. As the appellant did not appear before the Court, the proceeding was declared ex parte and finally, the impugned Judgment and decree have been passed by the Judge Family Court, Kendrapara.

7. By this appeal, the said Judgment has been challenged. It has been stated by Mr. P.K. Nayak, learned counsel that from scrutiny of the records it would be apparent that no notice was at all served on the appellant in as much as the appellant was all along living with the respondent, the petitioner in the C.P. No.148 of 2018. According to Mr. P.K. Nayak, learned counsel that from order dated 01.08.2018 passed in the Civil Proceeding, it would be evident that in the address given in the petition, the process server did not find anyone living there. On that day also the copy of the notice along with the petition was pasted in a place of that house. But, later on, at the instance of the respondent herein, the process was reissued for service on the appellant and consequently, the process was purportedly served on the appellant, as reflected in the order dated 22.12.2018.

8. Mr. R.C. Behera, learned counsel has quite categorically stated that the Judge, Family Court, Kendrapara has clearly observed that the notice was served on the respondent on affixture service. But she did prefer to not appear in the case, for which the proceeding was declared ex parte, by the order dated 26.02.2019.

9. After reading of the relevant orders, we find that in both the occasions i.e. 01.08.2018 and 22.12.2018, the Judge Family Court inferred that the appellant had refused to accept the notice. If the notice is refused, the appropriate recourse is provided under Order 5,

Rule 17 of the CPC. Rule 17 provides that where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

10. In the order dated 22.12.2018, we find that the respondent person who was present at the time of affixing the summon/notice has not been identified. No evidence of diligence has been placed on record by the Process Server. No name has been disclosed in whose presence the said notice was affixed on any part of the house of the appellant.

11. In the Judgment, what the Judge Family Court has reflected is something very strange. He has observed without applying mind to the requirement as reproduced before that the notice was served by affixture service.

12. The appellant herein has categorically denied that she ever refused the process or to accept or acknowledge the receipt of the

notice as She was never approached to accept notice nor any notice was ever tendered to her for such acceptance. Mr. R.C. Behera, learned counsel, as we understand proceeds to impress us by stating that the Court should go by the record, as reflected in the order dated 22.12.2018. We have reproduced the provisions of Order 5 Rule 5 of the CPC to refer how the affixture service can be done. As there was no independent witness either of refusal or affixture, it is very difficult to accept that the said affixing service was made in accordance with law.

14. In view of that, we are inclined to interfere with the impugned Judgment and decree and accordingly, those are set aside. However, we would like to remand the matter for fresh trial by the Judge, Family Court, Kendrapara from the stage of filing of the written statement. In view of the long pendency of this matrimonial dispute, we would further direct the parties to appear before the Judge Family Court, Kendrapara on 02.09.2022. It is made absolutely clear that no further notice will be issued to the parties by the Judge, Family Court.

15. Registry is directed to send down the LCRs with a copy of this order.

16. In view of the long pendency of the matrimonial suit, the Judge, Family Court, Kendrapara is directed to expedite the disposal, preferably within a period of six months.

17. The parties are to cooperate and they should not take any adjournment, unless they are persuaded by serious mitigating circumstances.

18. However, observed thus, this appeal stands allowed to the extent as indicated above.

19. Draw the decree accordingly.

(S. Talapatra)
Judge

(M.S. Sahoo)
Judge

Rati Ranjan





